

Supreme Court, U.S.

FILED

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2005

TAMMY FAIR,

*Petitioner.*

v.

UNITED STATES OF AMERICA

*Respondent.*

**PETITION FOR *WRIT OF CERTIORARI*  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

**PETITION FOR *WRIT OF CERTIORARI***

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**QUESTION PRESENTED FOR REVIEW**

Is an unknowing and involuntary waiver of one's fundamental constitutionally protected right to testify prejudicial *per se* and, therefore, not subject to harmless error analysis?

**LIST OF PARTIES**

The names of all parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit are:

Plaintiff-Appellee: United States of America

Defendant-Appellant: Tammy Fair

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THIS PETITION FOR A *WRIT OF CERTIORARI* SHOULD BE GRANTED BECAUSE THE ELEVENTH CIRCUIT COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT; HAS DECIDED THAT IMPORTANT FEDERAL QUESTION IN A MANNER INCONSISTENT WITH RELEVANT DECISIONS OF THIS COURT; AND HAS DECIDED THAT IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH DECISIONS OF FEDERAL CIRCUIT AND DISTRICT COURTS .....4

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Petitioner Tammy Fair requests that a *writ of certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit (11th Circuit Appeal No. 05-11631) entered on October 3, 2005, which affirmed the order of the United States District Court for the Northern District of Georgia, Gainesville Division (District Court Criminal Action No. 2:99-CR-33 and Civil Action No. 2:02-CV-22).

## **OPINIONS AND ORDERS BELOW**

The circuit court opinion affirming the district court is not reported, but is reproduced at pages 1a-5a in the Appendix attached to this petition. Neither the order of the district court nor the report and recommendation of the magistrate judge are reported, but each is reproduced at pages 6a-16a and 17a-56a, respectively, in the Appendix attached to this petition.

## **JURISDICTIONAL STATEMENT**

The Eleventh Circuit Court of Appeals entered its decision and opinion in this case on October 3, 2005. Petitioner did not seek rehearing or rehearing *en banc*, and timely files this petition pursuant to this Court's Rules 13.1 and 13.3.

Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1). The notifications required by this Court's Rule 29.4(b) and (c) are not applicable in this case.

## **CONSTITUTIONAL PROVISIONS INVOLVED**

"No person shall. . .be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ." U.S. Constitution, Amendment V.

"In all criminal prosecutions, the accused shall enjoy the right. . .to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor and to have the Assistance of Counsel for his defense." U.S. Constitution, Amendment VI.

"[I]t cannot be doubted that a defendant in a criminal case has the right to take the witness stand and to testify in his or her own defense." *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). "Whether the defendant is to testify is an important

tactical decision as well as a matter of constitutional right.” *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). This right to testify is found in several provisions of the Constitution: the due process clause, the compulsory process clause, the Sixth Amendment’s right of self-representation, and the necessary corollary of the guarantee against compelled testimony. *Rock*, 483 U.S. at 51-53.

### STATEMENT OF THE CASE

A jury in the United States District Court for the Northern District of Georgia, Gainesville Division, found Petitioner Tammy Fair guilty of maintaining a place for the purpose of distributing methamphetamine in violation of 21 U.S.C. § 856(a)(1) and guilty of possession of methamphetamine with the intent to distribute in violation of 21 U.S.C. § 841(a)(1) in a joint trial with her husband, Paul Junior Fair, from February 23, 2000, to March 6, 2000. Tammy’s trial counsel failed to advise her of her right to testify, and consequently, not knowing of her right to testify, she did not testify during the trial.<sup>1</sup>

On direct appeal the United States Court of Appeals for the Eleventh Circuit affirmed her conviction in an unpublished opinion, *United States v. Fair*, 251 F.3d 162 (11th

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<sup>1</sup> Tammy Fair testified that she was not advised that she had a right to testify and did not know she had a right to testify, and the magistrate judge, after hearing all the evidence, found that “[t]his testimony is uncontradicted by credible evidence to the contrary.” 39a. Even though the magistrate judge found “no substantial evidence to contradict [her] testimony and [concluded that] the preponderance of the evidence show[ed] that [her] counsel did not advise her of her right to testify,” 41a, the district court determined that “it is more likely than not that . . . [Tammy Fair] knew that she had a right to testify, and that [she] alone decided not to exercise that right.” 11a. The court of appeals did not take a position on this question.